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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re BRADFORD TITONE

on Habeas Corpus.

G042446

(Super. Ct. No. M-12285)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Thomas M. Goethals, Judge. Affirmed.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Heather Bushman and Linnea D. Piazza, Deputy Attorneys General, for Respondent and Appellant.

Sean K. Kennedy, Federal Public Defender, and G. Michael Tanaka, Deputy Federal Public Defender, for Petitioner and Respondent.

The Board of Parole Hearings¹ may grant an inmate parole if the inmate does not pose an unreasonable risk of danger to society if released from prison. If the Board grants an inmate parole, the matter is sent to the Governor for review, and the Governor may affirm, modify, or reverse the Board's decision.

Here, the Board granted Titone parole at his 10th parole suitability hearing finding he would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison, and the Governor reversed the Board's decision concluding he would pose such a risk. Titone filed a petition for writ of habeas corpus in the Orange County Superior Court, which was denied. Titone filed a petition for writ of habeas corpus in this court, which this court denied. Titone filed a petition for writ of habeas corpus in the California Supreme Court. The California Supreme Court denied the petition without prejudice for refileing his petition in the Orange County Superior Court pursuant to *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*). Titone refiled his petition for writ of habeas corpus in the Orange County Superior Court, which the court granted.

The Attorney General filed a notice of appeal in the Orange County Superior Court. The Attorney General also filed a petition for writ of supersedeas and request for stay in this court, which we denied. The Attorney General filed a petition for review with the California Supreme Court seeking review of our denial of the petition for writ of supersedeas and request for stay. The California Supreme Court denied the petition for review. Thereafter, the California Department of Corrections released Titone to parole.

¹ In July 2005, the Board of Parole Hearings replaced the Board of Prison Terms. (Pen. Code, § 5075, subd. (a).) Because both entities have performed the same duties, we refer to both as "the Board."

In this appeal, the Attorney General² argues the trial court erroneously ordered the Board's grant of parole because "it violates well-established principles of due process of law." The Attorney General contends we should remand the matter to the Governor for reconsideration pursuant to *Lawrence, supra*, 44 Cal.4th 1181, and all applicable statutory and regulatory authority. As we explain below, we conclude remand to the Governor would be an idle act as the Governor considered the undisputed facts and exercised his discretion in reversing the Board's decision granting Titone parole. We affirm the trial court's order reinstating the Board's decision granting Titone parole.

FACTS

In March 1984, then 19-year-old Titone returned home from partying in the early morning to find his landlord/roommate asleep on the living room couch. Titone retrieved a knife and a wood splitting wedge. He split the man's skull and stabbed him 18 times. Titone dragged the man outside to a shed, shampooed the couch, cleaned the weapons, and disposed of the man's pajamas. Later, Titone kicked in the front door to make it appear the home had been burgled, disposed of his tennis shoes, and considered disposing of the body. At trial, Titone presented evidence he had been drinking alcohol and using marijuana, amphetamines, and cocaine the night of the offense. A jury convicted Titone of second degree murder, and the trial court sentenced him to 16 years to life in prison.

Twenty-two years later, the Board granted Titone parole at his 10th parole suitability hearing because it concluded he "would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison." At the hearing, Titone stated drugs were a major contributing factor in committing the offense. Titone explained he was in turmoil during that time of his life. He was simultaneously having a homosexual relationship with a man and a heterosexual relationship with the man's

² Throughout these proceedings, the Attorney General appeared on behalf of Acting Warden Gary Sandor. We refer to them collectively as "the Attorney General."

daughter. He said his landlord who disapproved of his lifestyle was in the process of evicting him, and so he murdered him. The presiding commissioner noted Titone had never received a single rules violation citation (115) or counseling “chrono” (128). The Deputy Commissioner noted Dr. Steven C. Walker prepared a February 2004 Psychological Evaluation Report (Walker’s Report) and concluded Titone was a low risk for future violence. Walker’s report noted Titone accepted responsibility for the offense and offered no excuses or blame for his actions. The Deputy Commissioner characterized Titone as a “changed person.” Titone concluded by saying “that when [he] think[s] of the hurt that [he] committed on these people and all the people affected by this crime, [he is] truly sorry.”

The Board cited numerous reasons for its decision: he had no juvenile record of assaulting others; he had a stable social history as demonstrated by stable relationships with family while in prison; while in prison he enhanced his ability to lawfully function within the law; he obtained his high school equivalency diploma; he participated in numerous programs, including Narcotics Anonymous/Alcoholics Anonymous, Alternatives to Violence, Beyond Anger Management, Life Plan for Recovery, and Creative Conflict Resolution; he participated in vocational programs and is a licensed optician; he had numerous institutional job assignments with excellent work evaluations; and he lacks a significant criminal history.

The Governor reversed the Board’s grant of parole, finding Titone would pose an unreasonable risk of danger to society if released from prison. After noting Titone had “maintain[ed] a blemish-free prison misconduct record” and reciting all Titone’s achievements while in prison, the Governor stated that “[d]espite the positive factors [he] considered,” the second degree murder was “especially heinous” and “demonstrated an exceptionally callous disregard for [the victim’s] suffering and life.” The Governor stated Titone’s actions were more egregious than the minimum elements necessary to sustain a conviction for first degree murder. He stated Titone had many

opportunities to stop the attack, and he made great efforts to conceal his crime. Additionally, the Governor stated Titone's motive was "trivial" in comparison to the magnitude of the crime. The Governor said, "The gravity of the second-degree murder committed by . . . Titone is *alone* sufficient for me to conclude presently that his release from prison would pose an unreasonable public-safety risk." (Italics added.) The Governor concluded by saying that although Titone had made "some creditable [*sic*] gains in prison, including accepting responsibility for his actions and expressing remorse[,] the "gravity of the murder perpetrated by . . . Titone presently outweighs the positive factors."

After the superior court and this court denied Titone's petitions for writ of habeas corpus, he filed a petition for writ of habeas corpus in the California Supreme Court. While that was pending, the California Supreme Court decided *Lawrence, supra*, 44 Cal.4th 1181.³ The California Supreme Court denied Titone's petition without prejudice for refile in the superior court pursuant to *Lawrence, supra*, 44 Cal.4th 1181.

Titone filed a petition for writ of habeas corpus, the Attorney General filed an informal response, and Titone filed a traverse. The trial court granted the petition.

The trial court, after reciting the circumstances of the offense and the case's procedural history, stated there was no evidence Titone lacked insight into his offense. The court explained the Governor characterized his prison record as "blemish-free" and recognized he "accepted responsibility for his actions and expressed remorse." The court noted "the Governor specifically found that the gravity of the murder outweighed the positive factors[,] [and] [t]hus[,] it appears that the Governor did rely on the crime alone." The court noted the 22-year-old crime was temporally remote, and Titone had been a model prisoner and was discipline free. The court reasoned that because Titone was abusing drugs and alcohol at the time of the murder and he had dedicated his life to

³ The California Supreme Court decided *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*), the same day as *Lawrence*.

substance abuse education and prevention, “the conduct is unlikely to recur.” The court noted he had participated in self-help, educational, and vocational programs, and had realistic parole plans. The court explained there was nothing in his “pre- or post-incarceration history, or his . . . current demeanor” to suggest he posed a current danger to the public, and his psychological evaluations were supportive of release. The court opined, “The Governor may not, therefore, continue to rely solely on the commitment offense to deny parole[] because the circumstances of the crime alone do not support the conclusion that [Titone] remains a current threat to public safety.” The court concluded that because the Attorney General conceded there were no factual disputes and it appeared the Governor relied solely on the commitment offense to reverse the Board’s decision, remand to the Governor was unnecessary and the appropriate remedy was to grant the petition and reinstate the Board’s decision.

DISCUSSION

Legal Principles Governing Parole Suitability

Penal Code section 3041, subdivision (b), states, “The panel or the board, sitting en banc, shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.” Title 15 California Administrative Code, section 2401 provides in relevant part: “A parole date shall be denied if the prisoner is found unsuitable for parole under [s]ection 2402(c).”⁴

Section 2402(a) states: “The panel shall first determine whether the life prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel

⁴ We will refer to Title 15 California Administrative Code, section 2402 as “section 2402.”

the prisoner will pose an *unreasonable risk of danger to society if released from prison.*” (Italics added.) In making its determination, section 2402(b) authorizes the panel to consider “[a]ll relevant, reliable information[,]” including “the circumstances of the prisoner’s social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner’s suitability for release.”

Section 2402(c) and (d) list circumstances tending to show unsuitability and suitability, respectively. Both subdivisions state “the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the *panel.*” (Italics added.) In determining whether the Board properly denies an inmate parole, we must determine “whether ‘some evidence’ supports the conclusion that the inmate is unsuitable for parole because he . . . currently is dangerous.” (*Lawrence, supra*, 44 Cal.4th at p. 1191.) With these principles in mind, we will now discuss each of the suitability and unsuitability factors.

Suitability

Section 2402(d) states: “Circumstances tending to indicate suitability include: (1) No Juvenile Record. The prisoner does not have a record of assaulting others as a juvenile or committing crimes with a potential of personal harm to victims. [¶] (2) Stable Social History. The prisoner has experienced reasonably stable relationships with others. [¶] (3) Signs of Remorse. The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or indicating that he understands the nature and magnitude of the offense. [¶] (4) Motivation for Crime. The prisoner committed his

crime as the result of significant stress in his life, especially if the stress has built over a long period of time. [¶] (5) Battered Woman Syndrome. At the time of the commission of the crime, the prisoner suffered from Battered Woman Syndrome, as defined in section 2000(b), and it appears the criminal behavior was the result of that victimization.

[¶] (6) Lack of Criminal History. The prisoner lacks any significant history of violent crime. [¶] (7) Age. The prisoner's present age reduces the probability of recidivism.

[¶] (8) Understanding and Plans for Future. The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release.

[¶] (9) Institutional Behavior. Institutional activities indicate an enhanced ability to function within the law upon release.”

Unsuitability

Section 2402(c) provides: “Circumstances tending to indicate unsuitability include: (1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include: (A) Multiple victims were attacked, injured or killed in the same or separate incidents. (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder. (C) The victim was abused, defiled or mutilated during or after the offense. (D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. (E) The motive for the crime is inexplicable or very trivial in relation to the offense. [¶] (2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age. [¶] (3) Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others. [¶] (4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim. [¶] (5) Psychological Factors. The prisoner has a lengthy history of severe mental

problems related to the offense. [¶] (6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail.”

Recent California Supreme Court Decisions

In *Lawrence, supra*, 44 Cal.4th at pages 1196-1197, the Board, beginning in 1994, found petitioner suitable for parole four times, and on each occasion the Governor rejected the Board’s decision. The California Supreme Court concluded that although the crime petitioner committed was egregious, there was no evidence to support a determination she then posed a threat to public safety in view of her “extraordinary rehabilitative efforts specifically tailored to address the circumstances that led to her criminality, her insight into her past criminal behavior, her expressions of remorse, her realistic parole plans, the support of her family, and numerous institutional reports justifying parole, as well as the favorable discretionary decisions of the Board[.]” (*Id.* at p. 1226.) “[M]ere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required ‘modicum of evidence’ of unsuitability.” (*Id.* at p. 1227; *In re Calderon* (2010) 184 Cal.App.4th 670, 685 [aggravated nature of commitment offense does not in every case provide relevant evidence an inmate remains dangerous for purposes of parole determination].)

In *Shaputis, supra*, 44 Cal.4th at pages 1245-1246, the California Supreme Court reversed the Court of Appeal’s decision reversing the Governor’s reversal of the Board’s decision granting parole. In that case, there was evidence petitioner remained dangerous because the commitment offense was intentional and premeditated, he had a long history of violent and brutal conduct towards the victim, his children, and former wife, and he had not gained insight or understanding into his violent conduct or commission of the commitment offense. (*Id.* at pp. 1259-1260.)

Remedy

The Attorney General argues the trial court erroneously vacated the Governor's decision granting Titone parole for the following reasons: (1) the court's order divests the Governor of his authority to determine when an incarcerated person is suitable for parole; (2) the court's order violates the separation of powers; (3) the court's order grants relief beyond the process due; and (4) the Governor should be afforded the opportunity to reconsider Titone's parole suitability in accordance with *Lawrence* and *Shaputis*. With respect to its first three claims, previous cases have rejected the Attorney General's assertions, and we find those cases persuasive. As to its last claim, based on the record before us, we conclude remand to the Governor to reconsider Titone's parole suitability would be an idle act.

Due Process Concerns

The identical issues here were raised and rejected in *In re Masoner* (2009) 179 Cal.App.4th 1531 (*Masoner*). There, the Board granted appellant's parole, the Governor reversed the decision granting parole, appellant petitioned for a writ of habeas corpus, and the superior court granted the writ, employing essentially the same remedy as in this case—the court vacated the Governor's decision and reinstated the Board's decision granting parole. (*Id.* at p. 1535.) The Attorney General appealed, challenging the remedy on the grounds the trial court's order improperly divested the Governor of his right to review the Board's parole decisions, afforded appellant a remedy in excess of due process, and violated the separation of powers. (*Id.* at p. 1536.) The *Masoner* court rejected each of the Attorney General's arguments.

As to the first contention, the *Masoner* court held the Governor's right to review was satisfied by the review that resulted in his reversal of the Board's grant of parole. (*Masoner, supra*, 179 Cal.App.4th at p. 1537.) With respect to the second contention, the *Masoner* court noted that, “Although the *Board* can give the prisoner a new hearing and consider additional evidence, the *Governor's* constitutional authority is

limited to a review of the materials provided by the Board.’ [Citations.] Remanding the matter to the Governor would be an idle act because the Governor has already reviewed the materials provided by the Board and, according to the superior court’s unchallenged order, erroneously concluded that there was some evidence in those materials to support a reversal of the Board’s decision. [Citations.]” (*Id.* at p. 1538.)

The *Masoner* court concluded the Attorney General forfeited the separation of powers contention by failing to provide any analysis or cite any authorities. The court went on to note that it would reject the contention even if it had been preserved. Citing *In re Rosenkrantz* (2002) 29 Cal.4th 616, the *Masoner* court explained, “In *Rosenkrantz*, the Supreme Court held that judicial review of the Governor’s parole decisions under the ‘some evidence’ standard does not violate the separation of powers doctrine. [Citation.] A necessary component of judicial review is the power of the courts to provide the aggrieved party with a meaningful remedy. The remedy provided here does not infringe on the core functions of the Governor or on the Governor’s specific authority to review the Board’s parole suitability decisions. As stated, the Governor has already reviewed the Board’s 2007 decision.” (*Masoner, supra*, 179 Cal.App.4th at p. 1539.)

Finally, the *Masoner* court observed, “In the present case, appellant contends that the matter must be remanded to the Governor even though the superior court found that there was no evidence to support the Governor’s reversal of the Board’s parole decision, a finding the Governor does not challenge. If we were to adopt appellant’s position, however, a prisoner’s due process rights and the writ of habeas corpus would be meaningless under the circumstances of this case because the Governor could arbitrarily detain a prisoner indefinitely, without evidence of the prisoner’s current dangerousness and in violation of California law, and the courts would have no practical power to grant the prisoner relief. The rule proposed by appellant would entitle the Governor to repeatedly ‘reconsider’ the release of the prisoner no matter how many times the courts found that there was no evidence that the prisoner was currently dangerous.

Such a rule would violate principles of due process and eviscerate judicial scrutiny of the Governor's parole review decisions. We thus reject appellant's arguments and hold that the superior court acted well within its authority in declining to remand the matter to the Governor." (*Masoner, supra*, 179 Cal.App.4th at p. 1540; see *In re Moses* (2010) 182 Cal.App.4th 1279, 1313-1314 [remand to Governor idle act]; *In re Dannenberg* (2009) 173 Cal.App.4th 237, 256-257 [same]; *In re Vasquez* (2009) 170 Cal.App.4th 370, 386 [same]; *In re Burdan* (2008) 169 Cal.App.4th 18, 39 [same]; *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491 [same].)

We agree with the reasoning in *Masoner, supra*, 179 Cal.App.4th 1531. As we explain more fully below, the Governor's right to review was satisfied by the review that resulted in his reversal of the Board's grant of parole. Based on the record before us, we are confident there is nothing to support the conclusion Titone poses a current danger to society. Additionally, the Governor previously reviewed the Board's decision, and that decision, concluding Titone poses a current danger to society, is not supported by the evidence. Moreover, the remedy provided here does not infringe on the Governor's specific authority to review parole suitability decision because the Governor already reviewed the Board's 2007 decision. Finally, if we were to adopt the Attorney General's position, "a prisoner's due process rights and the writ of habeas corpus would be meaningless . . . because the Governor could arbitrarily detain a prisoner indefinitely, without evidence of the prisoner's current dangerousness and in violation of California law, and the courts would have no practical power to grant the prisoner relief." (*Masoner, supra*, 179 Cal.App.4th at p. 1540.)

Lawrence and Shaputis

The Attorney General does not argue Titone was unsuitable for parole. Nor does it argue insufficient evidence supports the trial court's order vacating the Governor's decision and reinstating the Board's order granting Titone parole. Instead, the Attorney General argues this court should remand the matter to the Governor so he can reconsider

Titone's parole suitability in accordance with the California Supreme Court's decisions in *Lawrence, supra*, 44 Cal.4th 1181, and *Shaputis, supra*, 44 Cal.4th 1241. Specifically, the Attorney General contends we should remand the matter to the Governor because based on *Lawrence* and *Shaputis*, he could conclude Titone lacks insight into the circumstances of the offense. The Attorney General claims the trial court did not "squarely address" this issue, and the Governor should be able to reconsider whether Titone's alleged lack of insight is sufficient grounds for denying him parole. In essence, the Attorney General requests the Governor have a second bite at the apple.

There is no dispute the same California Administrative Code sections governing parole suitability today were in effect when the Governor reversed the Board's decision granting Titone parole. One of the factors supporting a finding of suitability states, "The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or indicating that he understands the nature and magnitude of the offense." (Section 2402(d)(3).) One of the factors supporting a finding of unsuitability states, "The motive for the crime is inexplicable or very trivial in relation to the offense."

Here, as we explain above, the Governor after applauding Titone's rehabilitation, opined the second degree murder was "especially heinous" and "demonstrated an exceptionally callous disregard for [the victim's] suffering and life." The Governor stated Titone's motive was "trivial" in comparison to the magnitude of the crime. The Governor said, "The gravity of the second-degree murder committed by . . . Titone is *alone* sufficient for me to conclude presently that his release from prison would pose an unreasonable public-safety risk." (Italics added.) The Governor concluded by saying that although Titone had made "some creditable [*sic*] gains in prison, including accepting responsibility for his actions and accepting remorse[,]" the "gravity of the murder perpetrated by . . . Titone presently outweighs the positive factors."

Based on the record before us, we conclude the Governor relied solely on the commitment offense in reversing the Board's decision granting Titone parole. The Governor stated the gravity of the offense "alone" was sufficient to deny parole and the gravity of the offense outweighed the positive factors weighing in favor of parole. More importantly, the Governor concluded Titone "accept[ed] responsibility for his actions" and was "remorse[ful]." Implicit in this finding is that Titone understood the nature and magnitude of the offense and took responsibility for the offense. Indeed there is evidence in the record to support such a finding.

Titone stated there were several factors he believed contributed to his committing the offense—drug use, an identity crisis, and lack of a stable living environment. There was evidence Titone tried to correspond with the victim's family to make amends, and he participated in numerous rehabilitation programs to address his substance abuse and anger issues. Thus, there was evidence supporting the conclusion Titone had insight into the circumstances of the offense, and we conclude the Board and the trial court considered that evidence in reaching their respective conclusion.

The Attorney General asserts that in the Governor's 2007 decision the Governor expressed concerns Titone could not adequately explain why he attacked the victim. It cites to Titone's prior statements from 1984, 1995, 2002, 2003, 2004, 2006, and 2007 where he could not adequately explain the reasons for his actions. The Attorney General reads Titone's statements in isolation. When read in their entirety, Titone has consistently maintained the substance abuse was a contributing factor to the commission of the offenses and his relationship with the victim, his landlord, was not ideal. The Attorney General's suggestion Titone has changed his story over the years is not supported by the record.

The Attorney General relies on *In re Ross* (2009) 170 Cal.App.4th 1490 (*Ross*), and *In re Criscione* (2009) 173 Cal.App.4th 60 (*Criscione*), to support its claim remand is required. Neither case assists the Attorney General.

In *Ross, supra*, 170 Cal.App.4th at page 1496, the trial court denied a prisoner's petition for a writ of habeas corpus, finding some evidence in the record to support the Governor's decision to reverse the Board's grant of parole. The prisoner filed a petition for a writ of habeas corpus in the court of appeal. (*Id.* at pp. 1496-1497.) While the petition was pending in the appellate court, the Supreme Court issued its decision in *Lawrence, supra*, 44 Cal.4th 1181. Applying the standard of review articulated in *Lawrence*, the *Ross* court agreed with the trial court the Governor's decision was supported by some evidence. (*Ross, supra*, 170 Cal.App.4th at pp. 1497, 1504-1505, 1510-1512.) The *Ross* court concluded, however, the Governor's "written decision [was] flawed" because it did not contain "a more explicit 'articulation of a rational nexus between th[e] facts and current dangerousness,'" as required by *Lawrence*. (*Id.* at p. 1497.) Accordingly, the appellate court remanded to the Governor to permit him to articulate that "nexus" and to clarify whether he had relied on troubling evidence regarding the prisoner's mental state. (*Id.* at pp. 1498, 1513-1515.) Unlike *Ross*, in this case the trial court found no evidence in the record to support the Governor's decision.

In *Criscione, supra*, 173 Cal.App.4th at pages 74-75, the court determined it could not presume the Board applied the proper evidentiary standard because the parole decision at issue was made prior to issuance of *Lawrence* "and the Board's decision does not clearly indicate that it considered the nexus between the facts upon which it relied and its conclusion that [defendant] would present an unreasonable risk to public safety if released." (*Id.* at p. 77.) The court reasoned: "Where the standard of proof has been long settled, and absent a statement to the contrary, we ordinarily presume on appeal that a trial court applied the appropriate evidentiary standard. [Citation.] We would apply a similar presumption to decisions of the Board but the law pertaining to the parole

decision has not been long settled. Until *Lawrence*, some reviewing courts assumed that a parole denial based simply upon evidence that the commitment offense was particularly heinous, atrocious, or cruel [citation] comported with due process, so long as the Board indicated it considered the other regulatory factors. [Citation.] As *Lawrence* clarified, however, due consideration ‘requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness.’ [Citation.] In the present case, although the Board recited its conclusion that [defendant] would pose an unreasonable risk of danger to society or a threat to public safety if released from prison, the Board did not articulate any nexus between the factors upon which it relied and its ultimate conclusion.” (*Criscione, supra*, 173 Cal.App.4th at pp. 74-75.) The court concluded: “the Board did not have benefit of *Lawrence* and *Shaputis* and the Board’s decision does not clearly indicate that it considered the nexus between the facts upon which it relied and its conclusion that [defendant] would present an unreasonable risk to public safety if released. In these circumstances, we cannot presume that the Board applied the evidentiary standard as clarified by *Lawrence* or that it would have reached the same conclusion had it done so. Accordingly, remand is warranted.” (*Criscione, supra*, 173 Cal.App.4th at p. 77.) Unlike *Criscione*, in this case we can presume the Board applied the proper evidentiary standard, and we have not engaged in any reweighing of the evidence. Thus, the trial court properly vacated the Governor’s decision and reinstated the Board’s decision granting Titone parole.⁵

⁵ In *In re Prather* (2010) 50 Cal.4th 238, the California Supreme Court considered the limited procedural question of the proper scope of the decision of a reviewing court that concludes the Board has abused its discretion in denying a prisoner a parole date. That case has no application here.

DISPOSITION

The order is affirmed.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.